IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 364 of 1992

WITH

CRIMINAL APPEAL NO. 508 OF 1992

For Approval and Signature:

Hon'ble MR.JUSTICE N.J.PANDYA and
MR.JUSTICE H.L.GOKHALE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

BALU LAKHAMAN HARIJAN

Versus

STATE OF GUJARAT

Appearance:

Appeal No.364 of 1992:

Mr. Budhbhatti for the appellant.
Mr. Y.F. Mehta, A.P.P. for Respondent No. 1

Appeal No.508 of 1992

Mr. Y.F. Mehta, A.P.P. for the State
Mr. P.M. Thakkar, for the respondents.

CORAM : MR.JUSTICE N.J.PANDYA and
MR.JUSTICE H.L.GOKHALE
Date of decision: 26/11/96

ORAL JUDGEMENT

1. These two appeals arise out of the judgment of the learned Additional Sessions Judge, Jamnagar, rendered in Sessions Case No.59 of 1991, on 30th December, 1991. Six accused were facing charge as per Ex.2 of offences under Sections 302, 307, 324, 336, 337, 504 read with Section 34 of I.P.C. At the end of the trial, the learned Judge found that of the six accused, one Balu Lakhman Harijan, accused No.2, has committed the offence punishable under Section 302 as well as 307 of I.P.C. and has been awarded life imprisonment in that connection, of course, under Section 302, I.P.C. There was no separate sentence awarded for offence under Section 307. The learned Trial Judge has also imposed fine of Rs.1000/- and, in default to pay the fine, rigorous imprisonment for two months.

2. Criminal Appeal No.364 of 1992 is filed by the convicted accused and the State, in turn, has filed Criminal Appeal No.508 of 1992, challenging the acquittal order. Both the matters are, therefore, heard together and are being disposed of by this common judgment.

3. The incident happened on 21.4.1991 on the outskirts of city of Jamnagar, near the jail. Early in the morning, at about 5.30 or so, husband of the deceased-Badhiben was easing himself outside his dwelling place when original accused no.4-Vijayaben passed by and seeing the sight, she made certain disparaging comments which was not liked by the person.

4. He, therefore, came back in his house and complained to his wife-Badhiben that she should do something about this and explain to accused No.4 that she should behave properly. It seems that, this say of her husband was not carried out by Badhiben in a simple conversation between the two women, but in a body they went to the house of the accused and, in turn, the accused also responded in almost the same manner, which resulted in a free-for-all.

5. Unfortunately, the case as put forward before the Trial Court by the prosecution does not reveal anything that clear, but the defence has taken care to bring all these facts before the learned Trial Judge and the

learned Judge, being mindful of the cross complaint, has considered that aspect in paragraph 14 of his judgment at page 503 of the paper book.

6. As is required and expected of, the cross cases were heard by one and the same learned Judge and Sessions Case No.84 of 1991, arising out of the complaint given by the accused side was dealt with by the very learned Judge where, after recording the evidence, he acquitted the accused before him. Necessarily, the accused of that case are witnesses in the present case and vice-a-versa. The glaring feature of the trial so far as these appeals are concerned is that the injury to as many as two accused is not brought to the notice of the Court by the prosecution at all. It has been so done and brought on record at the instance of the defence when they examined defence witness, Dr. Bhadresh Ramaniklal Vyas, as defence witness No.1, Ex.80, at page 419. This very doctor was examined as P.W.2 at Ex.15 by the prosecutor. At this time, the defence could have served the prosecutor with the notice of asking the witness (P.W.2) to give all the papers relating to accused, but instead of that, the second alternative was opted for, namely, offering this witness as defence witness.

7. Till this matter was brought on record and till the learned Trial Judge discussed the same in paragraph 14 referred to hereinabove, it was not exactly clear as to how the incident had taken place.

8. A group of witness supporting a particular side would certainly be concentrating with regard to the incident from their point of view and would, therefore, not refer to the other part of the incident where the accused side may have also received some adverse effect, including injuries.

9. However, as a Prosecutor, the learned Advocate who did the duty before the Trial Court should have taken care to see that these facts are brought to the notice of the Court with whatever consequence it might bring about. Luckily the materials are there on the record and, therefore, we do not dwell on the point.

10. The injuries on the person of the deceased-Badhiben, according to the medical report, were by a long sharp cutting weapon, like Muddamal Article No.5-sword. A sword is the weapon said to have been used by original accused No.2-appellant herein. The injuries were starting with right side chest of the deceased piercing the upper lobe of the liver and going down

towards the peritoneum cavity and, as a result, there was profused internal bleeding. In the P.M. Note Ex.22 (page 207), the details of injury at page 213 are very elaborate and eloquent.

11. Accused No.2, i.e. the present appellant, is, therefore, directly implicated and leaving aside that in the aforesaid background, for the time being the depositions of witnesses were otherwise interested, there is one witness, namely, Sonaben Lakhman, P.W.10 (Ex.34). She attributes main role to the present appellant in no uncertain terms and only that could be done by the defence in her cross-examination was to draw her attention to the previous statement made before the Police. The only material contradiction in connection with the aforesaid background is that, in the previous statement, she had referred to the fact of there being a free-for-all between the two groups and in course thereof, according to her, both the sides had started quarrelling with each other with whatever weapon they could lay their hands upon. In other words, it was a free fight between the two sides with whatever weapon they could have in their hands.

12. Unfortunately, as rightly conceded by the learned Advocate Shri Budhbhatti on behalf of the appellant, these contradictions are not proved by putting proper questions by the Investigating Officer, who had recorded the same. These contradictions recorded in paragraph 21 on page 273 are, therefore, of no avail.

13. In view of the aforesaid position found out from the judgment as well as the defence witness, it can be inferred that, when true injuries are not explained by the prosecution, obviously, a case of there being a free fight is definitely made out. It is not to say that the present appellant-accused No.2 has not committed a crime. The only question posed before us by learned Advocate Mr. Budhbhatti, after taking us through the material on record, is whether it would be an offence under Section 302, i.e. murder or that of culpable homicide not amounting to murder, punishable under Section 304.

14. In the background of the aforesaid free fight and the manner in which the quarrel erupted, when the complainant group immediately reacted to the alleged insult to the husband of the deceased and when the accused side also reacted to it equally, in our opinion, it would amount to an offence of culpable homicide and would not amount to murder punishable under Section 302. We, therefore, hold that the conviction under Section 302

is not sustainable and the appeal is allowed to that extent only.

15. Now, the question remains is whether it would fall under Section 304 Part I or Part II. As a matter of fact, the injury is caused by a long sharp cutting instrument, which was clearly held by accused No.2 and, therefore, it is obvious that the case will fall under Section 304 Part I, I.P.C. In the result, the sentence of life imprisonment awarded by the Trial Court is reduced to Rigorous Imprisonment for 10 years. The other part of the order will remain as it is.

16. This takes us to the appeal of the State. In our opinion, the order of acquittal is not required to be interfered with at all. The learned Judge had the benefit of recording the evidence before his own eyes and, therefore, was best suited to interpret the testimony of each of the witnesses and he having done so correctly on the basis of the record and there being no room for saying that the appreciation of the evidence is not proper, we would not like to interfere with the order of acquittal. The appeal filed by the State is, therefore, dismissed.

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